IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 643

MARTIN RENE FRAZIER,

Petitioner,

—v.—

H. C. CUPP, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

R. A. NAHSTOLL
JONATHAN A. ATER
Loyalty Building
Portland, Oregon 97204

HOWARD M. FEUERSTEIN
1410 Yeon Building
Portland, Oregon 97204

Counsel for Petitioner

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Opinions Below

The opinion of the Supreme Court of the State of Oregon (Ex. 7, R. 20) affirming petitioner's conviction of second degree murder is reported at 245 Or. 4, 418 P.2d 841 (1966). The opinion of the United States District Court for the District of Oregon (R. 21-27; A. 6-10) granting the writ of habeas corpus is unreported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 41; A. 13-22) reversing the district court is reported at 388 F.2d 777 (9th Cir. 1968).

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 24, 1968 (R. 42; A. 23). A timely petition for rehearing *en banc* was denied on April 15, 1968 (R. 43; A. 24). The petition for writ of certiorari was filed July 15, 1968 and was granted October 14, 1968. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Whether the prosecution's placing before the jury in its opening statement the confession of a co-indictee constituted a denial of Frazier's constitutional right of confrontation and cross-examination, where the prosecution had reason to believe that the co-indictee might refuse to testify under the Fifth Amendment and the co-indictee did, in fact, refuse to testify.

2. Whether Frazier's confession, given after he had stated, "I think I had better get a lawyer before I talk any more," but his request ignored, was admissible under the test of *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L.Ed. 2d 977 (1964); and whether the confession was involuntarily induced either by a deliberate factual misrepresentation that the co-indictee had given a confession implicating Frazier, or by psychological coercion.

3. Whether the contents of Frazier's duffel bag were admissible against him after having been searched and seized without a warrant or Frazier's consent, but with the "consent" of another person.

Constitutional Provisions Involved

The pertinent provisions of the United States Constitution are:

United States Constitution—Amendment IV:

SEARCHES AND SEIZURES

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution—Amendment V:

CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution—Amendment VI:

JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution—Amendment XIV (§ 1):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

I. NATURE OF THE PROCEEDINGS

On November 19, 1964, the Grand Jury of Clackamas County, Oregon, indicted Martin Rene Frazier and Jerry Lee Rawls for first degree murder, accusing them of having strangled to death Russell Anton Marleau on Septem-

ber 22, 1964 (Tr. 8-9; A. 28-29).[1] Defendant Frazier was tried on January 26 through February 3, 1965. He was convicted of second degree murder and sentenced to serve 25 years in the Oregon State Penitentiary. The conviction was affirmed by the Oregon Supreme Court on October 12, 1966.

On March 1, 1967, Martin Rene Frazier filed a petition for writ of habeas corpus with the United States District Court for the District of Oregon pursuant to 28 U.S.C. 2241-54 (R. 1, 17; A. 1, 2). The district court granted the writ (R. 28; A. 11), but the court of appeals reversed, directing that the petition for writ of habeas corpus be dismissed (R. 42; A. 23).

II. Background of the Murder Trial

At the time of the crime, Martin Rene Frazier was a 20-year old Marine home on emergency leave for his mother's funeral. Between the time when Martin was eight years old and the time when he joined the Marines, Martin and his mother had lived alone. During this period, his mother was an invalid, living on welfare. Martin would work summers, giving most of the money he earned to his mother. Thus, they were very close, although his mother was often critical of him while she was under medication (Tr. 770-74).

Martin dropped out of school and joined the Marines when he was 17 (Tr. 774). Prior to the present conviction,

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[1] The six-volume transcript of Frazier's trial is Exhibit 2 (R. 18, 20; A. 27, 3, 5) of this proceeding. For convenience, this transcript will be cited herein as "Tr.," with parallel citations to the Single Appendix, if applicable.

he had no criminal record except for having been absent without leave from the Marine Corps (Tr. 531-32). On one such occasion he had been unable to get emergency leave to visit his critically ill mother, so he went home to see her without permission (Tr. 776). It was shortly after he was released from the brig that he was notified that his mother had died (Tr. 777). He was granted emergency leave and flew to Portland, Oregon, for her funeral, arriving on September 17, 1964 (Tr. 614, 777). In Portland, he stayed at the home of his aunt, Mrs. Robertson, who was the mother of the co-indictee, Jerry Rawls (Tr. 779, 780).

On the night preceding the funeral, Martin first went to the funeral parlor and spent half an hour alone with his mother (Tr. 779-80). He then left the funeral parlor and went drinking with his cousin, Jerry Rawls (Tr. 780).

The next morning, September 22, 1964, the body of Russell Anton Marleau was discovered (Tr. 295, 296). The time of death was fixed as the early morning of the date of discovery (Tr. 333-34). Although Marleau had received blows about the head, the Chief Medical Examiner determined that these blows were not the cause of death and would not have been fatal (Tr. 330). Instead, he concluded that Marleau died from manual strangulation, as indicated in part by fingernail marks on both sides of the neck (Tr. 327-28).

Martin Frazier was taken into custody two days later on September 24 (Tr. 469). He was taken to detective headquarters and interrogated (Tr. 470-71), after which he signed a written statement (Tr. 521-22). In the course of the interrogation and in the written statement, Martin admitted that he, Rawls and Marleau were together at the

time of Marleau's death and that an altercation had developed. He denied, however, that he had strangled, or had had any part in the strangling of Marleau (Tr. 476-519, 648-51; A. 50-76, 85-88). Martin was then taken before a magistrate and counsel appointed for him (Tr. 552).

About the time Frazier was being arraigned, Rawls was taken into custody (Sp. Tr. 14, 16).[2] The next day Rawls signed a statement admitting to the altercation, but denying that he was the one who strangled Marleau (Ex. 5, pp. 7-9, R. 20; A. 97-99, 5).

Frazier and Rawls were jointly indicted for first degree murder (Tr. 8-9; A. 28-29). Rawls pleaded guilty to a reduced charge of second degree murder, and at the time of Frazier's trial was in the county jail awaiting sentence (Tr. 741).

At Frazier's trial, the defense admitted that Frazier, Rawls and Marleau were together at the scene of the crime and that a fight developed during the course of which Frazier hit Marleau once or twice with a rock while Marleau was holding Frazier down. The defense contended, however, that Frazier did not strangle Marleau and that at the time when Rawls apparently strangled Marleau, Frazier was not aware of what was going on (Tr. 742-52). In so doing, the defense relied heavily on the fact that Frazier bites his fingernails to such a degree that the tabs of his fingers grow completely over where the ends of the nails ordinarily would be (Tr. 750-51, 799-801, 951-52); therefore, the defense suggested that Frazier's fingers could

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[2] Prior to Frazier's trial a hearing was held in connection with his motion to suppress certain evidence. The transcript of this hearing (Ex. 1, R. 18, 20; A. 25, 3, 5) will be cited herein as "Sp. Tr.," with parallel citations to the Single Appendix, if applicable.

not have left the fingernail impressions on Marleau's neck as described by the medical examiner (Tr. 320, 328).

The defense further contended that even if Frazier had participated in the crime, he would be innocent by reason of insanity (Tr. 752-64). The defense produced two psychiatrists and a psychologist who testified that because of an incipient schizophrenic illness, the recent death of his mother, the visit to the funeral parlor, and other circumstances, Frazier would not have understood the nature and the consequences of his acts at the time of Marleau's death (Tr. 856-59, 927-29, 943-51).

The prosecution, on the other hand, relied primarily upon circumstantial evidence in order to attack Frazier's version of what transpired. The state relied upon such items as discrepancies between Frazier's written statement and his testimony at trial (Tr. 829-30), the position of stains on his clothing (Tr. 721-22; Ex. 3, pp. 15-16, R. 20), and a witness who had heard someone call out for help during the night of the crime (Tr. 586-87). The prosecution also produced two psychiatrists who testified that Frazier would have been capable of knowing the nature and consequences of any of his acts that night (Tr. 962-63, 974-75).

The issues, therefore, were clearly drawn for the jury: (1) Based upon the credibility of his testimony, did Martin Frazier strangle Marleau or participate in the strangling of Marleau? (2) If so, was Frazier innocent by reason of insanity? (3) If guilty, what was the degree of his guilt?

III. Prosecution's Reference to Co-indictee's Confession in Opening Statement

Martin Frazier's trial for first degree murder commenced on January 26, 1965. Prior to selecting a jury, counsel met in chambers with the court in order to discuss certain preliminary matters (Tr. 2-7; A. 27-28). At that time, Frazier's counsel warned that he had been advised that same morning by counsel for Jerry Lee Rawls that Rawls had received a subpoena, but that Rawls would assert the Fifth Amendment if required to appear. Frazier's attorney stated the purpose of this warning: ". . . we would consider it prejudicial and deliberate misconduct on the part of the District Attorney to attempt to tell the jury what Mr. Rawls might testify to when he has been advised that Mr. Rawls wouldn't testify." (Tr. 6; A. 28). The District Attorney replied that he had heard a rumor that Rawls was going to assert the Fifth Amendment and that he was aware of the information recited to the court by Frazier's counsel. He stated, however, that his conduct with respect to Rawls would depend upon the information available to him at the time of his opening statement (Tr. 6; A. 28).

A jury was selected, and the next morning the District Attorney made his opening statement (Tr. 243-270; A. 29-47). In the course of his opening statement, after relating Frazier's written statement, the District Attorney set forth the substance of Rawls' confession:

> ". . . We are going to call Mr. Rawls as a witness in this case, and expect that he will testify substantially in the same general area although with some differences because it is Rawls' version that Marleau never

mentioned anything about sexual attacks or approaches or anything like that. He says Rusty, that was driving the Olds, was driving too fast and they were afraid and they wanted to stop the car and get the keys. When they tried to take the keys a fight ensued. Mr. Rawls says that Rusty got out of the car and came around the other side of the car and then walked toward Rawls and that Rawls hit Rusty first. This is Rawls' version; that there was an argument back and forth about the keys to this car and then Rusty hit Rawls. *Maybe I am wrong. I will look here as to whether Rawls said he hit him first.* No, I guess it is Rawls' position that Rusty hit Rawls . . . ." (Tr. 261-62; A. 41-42). (Emphasis added.)

The District Attorney then paraphrased almost sentence for sentence the remainder of Rawls' confession, which implied that Frazier strangled Marleau (Tr. 262-64; A. 42-43). This portion of the opening statement and Rawls' confession (Ex. 5, pp. 7-9, R. 20; A. 97-99, 5) are compared in Appendix A of this brief. As the transcript indicates, the District Attorney had in his hands Rawls' written confession, to which he referred during the course of his opening statement (Tr. 272; A. 48).[3]

Immediately after the close of the opening statement, the defense moved for a mistrial based upon the reading from Rawls' statement (Tr. 272; A. 48). The court declined to rule on the motion at that time (Tr. 272; A. 48).

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[3] "The Court: He had a statement in his hands, it was obvious he had some kind of a paper in his hands.

Mr. Goodwin: The record will show how close it was." (Tr. 272; A. 48).

Later in the trial the prosecution called Rawls as a witness. Rawls, appearing with one of his attorneys, invoked the Fifth Amendment and declined to answer any questions concerning the crime (Tr. 574-77; A. 78-80).

The defense renewed its motion for a mistrial, and a hearing was held outside the presence of the jury (Tr. 577-84; A. 80-85). Rawls' attorney stated that on two occasions he had told persons in the District Attorney's office that Rawls was not going to testify (Tr. 579; A. 81-82). The District Attorney replied that one of his deputies told him that "he felt sure" that Rawls was going to testify, and that several other persons advised him that Rawls planned to testify. (Tr. 580; A. 82). The court denied the motion (Tr. 583-84; A. 84-85). When the motion for mistrial was renewed later in the trial (Tr. 733; A. 88), the court denied the motion on the ground that the District Attorney did not specifically state that he had a statement from Rawls and did not quote exactly what Rawls had said (Tr. 734; A. 89). The court added that there was no evidence in the case that Rawls ever made a statement (Tr. 735; A. 89).

The jury was never specifically instructed to disregard that portion of the District Attorney's opening statement, although the court generally instructed the jury not to regard statements of counsel as evidence (Tr. 995; A. 95-96).

After Frazier's conviction of second degree murder, Rawls changed his plea and was tried and convicted of second degree murder. The conviction was reversed and remanded for new trial on the basis of erroneous instructions. *State* v. *Rawls*, —— Or. ——, 429 P.2d 574 (1967).

In the present case, the district court held that because of the opening statement Frazier was denied the right to confront and cross-examine Rawls when he took the Fifth Amendment (R. 25-26; A. 9). The court of appeals held that the controlling question should be the good faith or lack of good faith of counsel and whether the opening statement was unfairly prejudicial to the defendant. 388 F.2d at 779 (R. 41; A. 15-16). The court concluded that there was not sufficient evidence that the prosecutor acted in bad faith. 388 F.2d at 779-80 (R. 41; A. 16-18).

IV. Admission of Frazier's Written Statement

Martin Frazier was taken into police custody at approximately 4:15 p.m. on Thursday, September 24, 1964, and was brought directly to detective headquarters (Tr. 469-70, 473-74). At that time the investigation had focused upon Frazier and Rawls, based primarily on a tip received from a member of Rawls' family (Tr. 472, 474-75).

The interrogation of Frazier commenced around five o'clock that afternoon (Tr. 470-71). A tape recording had been made of the interrogation (Tr. 476-519; A. 50-76), and the tape was played back to the court in chambers in order to determine the admissibility of Frazier's written statement.

The sequence of events as revealed by the tape of the interrogation was essentially as follows:

1. Preliminary questioning, during the course of which Frazier admitted that he went out with his cousin, Jerry Rawls, on the night in question, but denied being with anyone else (Tr. 486-87; A. 56). Frazier stated that he had left his Marine uniform at a girl friend's house (Tr. 487-88; A. 56-57).

2. Frazier was then advised:

"Q. Well, you see, we asked you if you would come here today, because we wanted to talk to you, and you didn't object to coming. There are certain things that we want to ask you about, and if you want an attorney, why you can have an attorney. We want to question you about some things that might be important to you, at least they are important to us. What you say here could be used against you in a trial, you understand that?

A. Yes.

Q. You have been through this business before, I am sure, so you are aware of that. Now, we know that you were not altogether in the area of Scotty's Monday night, or early Tuesday morning. . . ." (Tr. 488; A. 57).

3. The questioning then became more accusatory and aggressive, but Frazier continued to deny that he was with anyone other than his cousin (Tr. 488-90; A. 57-58).

4. The interrogator then falsely advised Frazier that Jerry Rawls was already in custody and had confessed:

"Q. I am not trying to tell you anything. You tell us. We would like to have you tell us about this thing. Do you know where Jerry is?

A. I think he is over on 97th. That is where I left him.

Q. We know where Jerry is. Jerry has talked to us. Jerry has told us the whole story.

A. Where is he?

Q. Where do you suppose he is? He is not out walking the streets. He told us what happened.

A. I don't know what Jerry told you.

Q. We know. There is no use you trying to fool us. You are going to have to face this. So that we won't have to sit here an hour or two hours, would you just as sooh tell us now and get it over with?" (Tr. 490-91; A. 58-59).

In truth, Jerry Rawls was not arrested until some four hours later (Sp. Tr. 14), and the officers had not talked to Rawls as of the time of Frazier's interrogation (Tr. 474, 475).

5. The questioning continued (Tr. 491-92; A. 59). Knowing that Frazier had not eaten all day, the interrogator stated that Frazier could eat as soon as he told them what had happened.[4] Frazier then admitted that he had been with Marleau on the night of the crime and stated that Marleau had made homosexual advances toward him (Tr. 492-93; A. 60).

6. Frazier related the events which had occurred up to the time when the group arrived near the place where the crime occurred (Tr. 493-95; A. 60-61). At this point Frazier stopped and said:

"A. I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now.

Q. You can't be in any more trouble than you are in now. You have been with him, and you have gone

[4] The officer stated: ". . . I am sure you don't want to drag this out any longer than we want to drag it out. We would like to wrap this thing up, so to speak, and get you over there where you can get something to eat and get some rest. I know you haven't had anything to eat today, have you? A. No." (Tr. 492; A. 59).

down 82nd with him, and you say he started this whole business. So you turned down the street. And who persuaded him to park the car? Was this his idea to park the car and get out?" (Tr. 495-96; A. 61).

7. Frazier then made a detailed statement of how the fight occurred and his involvement in the fight (Tr. 496-510; A. 61-70), although he denied having strangled Marleau (Tr. 500; A. 64). Frazier stated that he had burned the uniform that he had worn the night in question (Tr. 508; A. 69).

8. The officer then offered to type up a written statement, asked Frazier whether he would sign the statement, and stated that the officer would testify as to Frazier's oral admissions if he did not sign:

"Q. . . . We are not going to force you to do it. You don't have to do it. It is entirely up to you. It is so much to your benefit, if anybody's, rather than prolonging the agony, because this way you can get in the facts, your knowledge about the guy being a queer and so on and so forth. You can take the stand and you will be able to get in some of these things. It is up to you if you want to do it. You understand we are not pressing you, not pressing you to do anything against your will. *You have already told us all of it. In the event we take the stand, we will testify to what we have talked about here,* and if we want to condense it and put it on paper, you have the right to read it and correct it, and you can sign it if you wish. We would like to do it that way. There is nothing that alters the facts. The only thing is it does give the facts. It doesn't alter the fact that you were there

and told us that. It isn't that we are trying to make out that you are guilty of something that you are not. You realize that. You have already told us. We knew that before we came and got you, or we wouldn't have came and got you. We knew who you were, and we told you the same story. You wouldn't object if we did it?

A. I don't know.

Q. O.K. If you don't object. I don't want to type this out and you say you don't want to. How about a cup of coffee. Could you go for that? Cream and sugar?" (Tr. 510-11; A. 70-71). (Emphasis added.)

The officer then told Frazier that from this point on he would have to depend upon his attorney and that the court would appoint him an attorney at his arraignment.[5]

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[5] "Q. All I can tell you is that everything is taken into consideration, from this point on you have got to depend on your attorney. You are not going to be railroaded. You are not going to be abused. You are not going to be slapped around and beat around, or anything. You are entitled to all the protection of the law. You will have an attorney. If you can't afford to hire one, the court will appoint you an attorney. You are going to have an attorney. We want to make this clear to you. You are entitled to an attorney. You are going to have the attorney, whether you pay for it or not. So you have got to put yourself in the hands of your attorney.

Now, there is a chance that you will be arraigned this evening. What they will do is issue the charge and if it is done this evening the judge will immediately appoint you an attorney tonight. *When you are arraigned he will immediately appoint you an attorney.* Don't feel that you are left all by yourself. You are not.

A. I am not no murderer. I don't understand what happened.

Q. We can understand how these things happen. They are certainly not condoned by society, that is for darn sure. But I wanted it made very clear to you that you have this right to an attorney and to know that the things that you say can be used against you in court. I don't want to underemphasize that. I want to emphasize that to you. You have these rights, and nobody can take them away from you. As I said before, we have some splendid attorneys here. If you are not satisfied with the attorney that is appointed, and if

9. Frazier was questioned further until a stenographer arrived, at which point the tape ends (Tr. 513-19; A. 72-76).

The interrogation ended shortly after six o'clock (Tr. 521). The stenographer began typing the written statement at 6:15, and Frazier signed the statement at 6:45 (Tr. 521, 541-42). The written statement (Tr. 648-51; A. 85-88) is basically similar to Frazier's oral admissions on the tape,[6] except that at the top of the mimeographed form of statement is a printed assertion that the signer is making the statement of his own free will, without fear, threats or promises, that the signer knows he is not required to make any statement, and that the statement may be used against him (Tr. 523, 648; A. 86). Typed in at the end of the statement are the words: "I hereby certify that I have been advised of my constitutional rights by the officers and waived my rights to have counsel present when the officers questioned me." (Tr. 522-23, 651; A. 87).

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you have funds, you can hire an attorney of your own choosing. We have competent attorneys, and the seriousness of this crime, they are going to be sure that you get a good attorney, because it is not their idea to get you an attorney that is not competent, because this is a grave crime. You are going to be appointed a good attorney so far as that is concerned. I wish you would just rest easy on that point. I know that you can't rest easy over what has happened. You are a normal boy, a young man, I should say, and you know what grave consequences can come out of this. It is just too bad these things happen, but they do. I feel sorry for you and your family. It is not good." (Tr. 511-13; A. 71-72). (Emphasis added.)

[6] The written statement asserts that Marleau tried to unzip Frazier's pants (Tr. 650; A. 87), although Frazier made no such assertion during the interrogation (Tr. 497-98, 501-02; A. 62-63, 65-66). At the trial Frazier denied that Marleau tried to unzip his pants, and the prosecution used the written statement to impeach Frazier's testimony on this point (Tr. 816, 830).

Frazier received no warnings or advice as to his constitutional rights other than those contained in the tape recording or recited in the written statement (Tr. 527; A. 76). Frazier testified that the reason he signed the written confession was because everything was already on tape, and he did not know that he had a right to a lawyer before signing the statement (Tr. 536).[7]

The Oregon trial court ruled that the written statement was admissible (Tr. 557-60; A. 76-78), and the statement was placed into evidence over the objections of the defense (Tr. 647; A. 85). The court instructed the jury that it could not consider the written statement unless it found that the statement was given voluntarily (Tr. 1010-11; A. 96).

During the course of the trial, Frazier took the stand and testified in his own defense. His testimony with respect to the fight which resulted in Marleau's death (Tr. 790-94; A. 92-94) was essentially the same as that contained in the written statement, except that he denied that Marleau tried to unzip his pants and admitted that he did not burn his uniform. The prosecution used these variations to attack his credibility (Tr. 829-30).

The district court held that Frazier's statement did not conform to the requirements of *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L.Ed. 2d 977 (1964), and

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[7] "Q. (By Mr. Goodwin) Would you have signed it if you had not relied upon the fact that it was already on tape and that it didn't make any difference whether it was taped or written? A. Right. Then I didn't know. I didn't know what was going on. I didn't know if it was right to make a statement, the way they were talking to me it was better for me. I didn't know I had a right to a lawyer before I signed the statement. They told me I had the right to a lawyer after I said everything that was on tape, and one thing led to another." (Tr. 536).

that the error was not cured merely because Frazier took the stand and testified substantially in accordance with his confession (R. 25; A. 9-10). The court of appeals held that *Escobedo* was limited to its facts and that the present case does not fall within the scope of those facts. 388 F.2d at 781-82 (R. 41; A. 18-21).

V. Search and Seizure of Contents of Frazier's Bag

While in Portland for his mother's funeral, Frazier stayed at the home of his aunt, Mrs. Robertson, who was the mother of the co-indictee, Jerry Rawls (Tr. 779, 780). Frazier and Rawls shared a bedroom in which Frazier kept his blue zippered compartmented bag (Sp. Tr. 26; Tr. 616, 632-33). The bag contained civilian and military clothing, together with toilet articles (Sp. Tr. 27-28). At the time it was seized by the police, the side pockets of the bag apparently contained certain articles of clothing belonging to Rawls (Sp. Tr. 23, 38-39).

Jerry Rawls was arrested when he came home at 9:30 p.m., September 24, 1964, at a point about one hundred feet from his house (Sp. Tr. 14, 16). The arresting officers asked Rawls if they could have the clothing that he wore the night in question (Sp. Tr. 20; A. 26). Rawls said that they could, and the officer asked where it was. (*Ibid.*) Rawls replied that it was in a blue duffel bag in his bedroom, but did not say to whom the bag belonged (Sp. Tr. 17, 20; A. 25, 26). The officers, along with Jerry Rawls' brother, went into the house and asked Mr. and Mrs. Robertson if they could have the bag; the Robertsons said "Yes." (Sp. Tr. 20; A. 26).

An officer went into the bedroom and brought the bag out (Sp. Tr. 20; A. 26). Another officer opened one of the

side zippered pockets, looked in it, and saw some clothing which he believed to be Rawls'. He then asked Mrs. Robertson if he could have the bag and the contents, and she said, "Yes." (*Ibid.*) The officer did not ask to whom the bag belonged (Sp. Tr. 23-24). He then zipped up the bag and left the house with it (Sp. Tr. 20; A. 26).

When the bag was later inspected, it was found to contain bloodstained clothing belonging to both Frazier and Rawls (Sp. Tr. 36-37) and a broken car key, later determined to belong to Marleau (Sp. Tr. 38-39; Tr. 714-16).

Frazier did not give anyone permission to take the bag out of the Robertsons' house or to open the bag or remove its contents (Sp. Tr. 28). The officers did not seek a warrant to search or seize the bag or its contents (Sp. Tr. 21; A. 26).

Prior to the trial, the defense moved to suppress the contents of the bag, but after a hearing the motion was denied (Sp. Tr. 58). At the trial the contents were received in evidence over the objections of the defense (Tr. 715, 716). The prosecution used Frazier's bloodstained clothing in its closing argument in an attempt to impeach Frazier's testimony as to his part in Marleau's death (Ex. 3, pp. 15-16, R. 20).

The district court did not pass on the search and seizure issue (R. 27; A. 10), but the court of appeals held that the search and seizure was lawful, and in the alternative held that the admission of the bag's contents was, at most, harmless error. 388 F.2d at 783 (R. 41; A. 21-22).

Summary of Argument

Petitioner, Martin Rene Frazier, submits that his Oregon trial, which resulted in his conviction for second degree murder was infected with three constitutional errors, each of which supports the judgment of the district court granting the writ of habeas corpus and requires reversal of the decision below.

I.

In his opening statement, the Oregon prosecutor read to the jury substantially all of the confession of Frazier's co-indictee and alleged accomplice, Rawls. When Rawls was called as a witness for the prosecution, he asserted his privilege not to testify, and he was excused from the stand. These events violated Frazier's Sixth Amendment right to confront and cross-examine Rawls, according to the principles of *Douglas* v. *Alabama*, 380 U.S. 415, 85 Sup. Ct. 1074, 13 L.Ed. 2d 934 (1965), and *Bruton* v. *United States*, 391 U.S. 123, 88 Sup. Ct. 1620, 20 L.Ed. 2d 476 (1968).

The Ninth Circuit held, however, that neither this case nor *Douglas* presented questions under the Sixth Amendment, but instead were to be analyzed in terms of prosecutorial misconduct, with the "controlling question" being the good or bad faith of the prosecutor. The court then held that the Oregon prosecutor had acted in good faith, even though he had been reliably warned that Rawls would refuse to testify.

The Ninth Circuit wrote its opinion prior to this Court's decision in *Bruton*. We submit that the premises of the decision below have been flatly refuted by *Bruton* and that

those premises conflict with recent decisions of the First Circuit and the Southern District of New York. *Robbins* v. *Small*, 371 F.2d 793 (1st Cir. 1967); *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580 (S.D.N.Y. 1967).

II.

At Frazier's Oregon trial, his written confession was received into evidence over objection. That confession was the end product of an oral interrogation. During that interrogation, Frazier received belated and perfunctory warnings of his rights to counsel and silence, but only after he had begun to incriminate himself. When he then requested the assistance of counsel, his interrogators turned aside and ignored his request and instead pushed him to further implicate himself.

On these facts, Frazier was denied his Sixth Amendment right to the assistance of counsel at a critical stage of the proceedings. *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L.Ed. 2d 977 (1964). This case is governed by *Escobedo* because the Oregon trial began on January 26, 1965. *Johnson* v. *New Jersey*, 384 U.S. 719, 86 Sup. Ct. 1772, 16 L.Ed. 2d 882 (1966).

In addition, the record shows that Frazier's confession was induced by deliberate and false representations that the alleged accomplice, Rawls, had already confessed and was induced by psychological coercion by the police. The confession was therefore involuntary and inadmissible under the Fifth and Fourteenth Amendments.

III.

The prosecution placed into evidence bloody clothing belonging to Frazier. The clothing had been taken from Frazier's duffel bag, which had been seized following the later arrest of Rawls. Frazier did not consent to the search of the bag, and the search was accomplished without a search warrant.

The Ninth Circuit upheld the search of the duffel bag on the theory that Rawls—some of whose clothing was in the bag—had consented to the search and that his consent was binding upon Frazier. Alternatively, the court held that the admission of the bloody clothing was harmless error.

Neither Rawls nor his family had authority to consent to the opening of Frazier's bag, and they particularly had no authority to authorize the search of the compartment of the bag containing Frazier's clothing or the seizure of that clothing. *Stoner* v. *California,* 376 U.S. 483, 84 Sup. Ct. 889, 11 L.Ed. 2d 856 (1964); *Reeves* v. *Warden,* 346 F.2d 915 (4th Cir. 1965). Moreover, once the bag was in police possession, there was no urgent or other reason for a search of its contents without a warrant.

It is inconceivable that the admission of bloody clothing allegedly worn by Frazier on the night of the crime was harmless, particularly in view of the prosecution's use of the clothing in its closing argument to prove Frazier a "liar." The alternative holding conflicts with the principles of *Fahy* v. *Connecticut,* 375 U.S. 85, 84 Sup. Ct. 229, 11 L.Ed. 2d 171 (1963), and similar later decisions.

ARGUMENT

I.

Frazier Was Denied the Right to Confront and Cross-Examine His Alleged Accomplice, Rawls, When Rawls Refused to Testify After the Prosecution Had Already Placed the Substance of Rawls' Confession Before the Jury in Its Opening Statement.

The fundamental rights of confrontation and cross-examination guaranteed by the Sixth Amendment were incorporated into the Fourteenth Amendment and made applicable to the states in *Pointer* v. *Texas*, 380 U.S. 400, 85 Sup. Ct. 1065, 13 L.Ed. 2d 923 (1965).

On two occasions since *Pointer*, this Court has held that the constitutional right of cross-examination must be protected with special diligence where a defendant is faced at trial with the confession of an alleged accomplice, *Douglas* v. *Alabama*, 380 U.S. 415, 85 Sup. Ct. 1074, 13 L.Ed. 2d 934 (1965); *Bruton* v. *United States*, 391 U.S. 123, 88 Sup. Ct. 1620, 20 L.Ed. 2d 476 (1968). In *Douglas*, the accomplice's confession was not admitted into evidence, but was placed before the jury by the prosecutor's interrogation of the defendant, who repeatedly asserted his privilege not to testify. In *Bruton*, the alleged accomplices were tried jointly; the oral confession of one (implicating the other) was testified to by a postal inspector. Read together, these cases establish the principles which control this case:

1. Where the prosecution places before the jury the substance of an accomplice's confession—but not the testimony of the accomplice—the defendant is denied his right of confrontation.

2. This denial is accomplished whether the accomplice's confession is placed into evidence directly or brought to the jury's attention by indirect means.

3. The incriminating statements of an accomplice are inherently suspect and prejudicial, and the denial of the right to cross-examine the accomplice is so fundamental that it cannot be cured by limiting instructions:

> ". . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt* v. *Utah*, supra; Throckmorton v. Holt, 180 U.S. 552, 567, *Mora* v. *United States*, 190 F.2d 749; *Holt* v. *United States*, 94 F.2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." *Bruton* v. *United States*, 391 U.S. at 135.

4. The denial of the right to cross-examine the accomplice is constitutional error requiring reversal, regardless

of the motives of the prosecutor. Compare *Brookhart* v. *Janis*, 384 U.S. 1, 86 Sup. Ct. 1245, 16 L.Ed. 2d 314 (1966), holding that denial of cross-examination is constitutional error of the first magnitude; and *Chapman* v. *California*, 386 U.S. 18, 23-24, 87 Sup. Ct. 824, 17 L.Ed. 2d 705 (1967), holding that a constitutional error requires reversal unless harmless beyond a reasonable doubt.

Bruton and *Douglas* share with the case at bar the common fact that effective confrontation of a confessing accomplice was denied when the confession was placed before the jury and the confessor exercised his privilege not to testify. For the reasons announced in *Bruton* and *Douglas*, the opinion of the Ninth Circuit upholding petitioner's conviction is wrong and must be reversed.

The Ninth Circuit erroneously held that the "controlling question" was the prosecutor's good faith or lack thereof. 388 F.2d at 779 (R. 41; A. 22). Apparently, that court confused the specific, fundamental right of confrontation with the more general prohibition against prosecutorial misconduct. Compare *Miller* v. *Pate*, 386 U. S. 1, 87 Sup. Ct. 785, 17 L.Ed. 2d 690 (1967) (prosecutorial misconduct by knowing use of false evidence); see "The Supreme Court, 1967 Term," 82 Harv. L. Rev. 63, 235 (1968).

We suggest that the Oregon prosecutor, if not guilty of misconduct, at the least, took a calculated risk that Rawls might testify, which failed. But, while those facts aggravate the constitutional error, they are not essential to the conclusion that Frazier's right of confrontation was denied. Frazier was just as surely denied his right to confront and cross-examine Rawls whether or not the prosecutor acted in "good faith," "bad faith," or negligently.

The Ninth Circuit, which filed its opinion and denied the petition for rehearing prior to this Court's decision in *Bruton*, supported its holding by a serious misreading of *Douglas*. The court stated that *Douglas* was a "flagrant case" of "bad faith" and so distinguished it from the presumably less flagrant case at bar. 388 F.2d at 780 (R. 41; A. 17-18). Yet, although counsel for *Douglas* argued to this Court that the misconduct of the prosecutor in that case was an adequate ground for decision,[8] there is nothing in the opinion of this Court which suggests that bad faith is the touchstone of decision. Indeed, even a cursory reading of the opinion suggests that its principles stand independent of prosecutorial motive.

In the period between *Douglas* and *Bruton*, two federal courts in addition to the Ninth Circuit were called upon to apply *Douglas* to denials of the right to confront alleged accomplices. *Robbins* v. *Small*, 371 F.2d 793 (1st Cir. 1967); *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580 (S.D. N.Y. 1967). Each court properly read *Douglas* and anticipated *Bruton* by holding that such denials require reversal regardless of prosecutorial motivation.

In *Robbins* v. *Small*, the First Circuit was faced with facts similar to those in *Douglas*. It noted that "basic fairness" required that the prosecutor discontinue his leading questions when the witness claimed his privilege, but it specifically refused to rest its holding on a finding of bad faith:

> "The fact that the prosecutor did not originally know that the witness intended to claim the privilege does not excuse his subsequent conduct nor is it of any con-

[8] See Brief of Petitioner, summarized in 13 L.Ed. 2d 1253.

sequence that in asking the questions he was not improperly motivated. The resulting prejudice was the same." 371 F.2d at 795, n. 11.

In *Deegan*, a joint trial, the court considered at length and rejected alternative claims of prosecutorial misconduct in other aspects of the case. 268 F. Supp. at 585-93. But its discussion of the confrontation issue makes no mention of misconduct as a contributing factor to its holding that petitioner's right of confrontation was denied. To the contrary, Judge Frankel's studied opinion is a remarkable harbinger of this Court's opinion in *Bruton*.

There can be little doubt that the Ninth Circuit's opinion in this case is in serious conflict with the principles of *Douglas, Robbins* and *Deegan*. But if there was ever any doubt, it has been completely dispelled by the decent decision in *Bruton*.

Bruton was a joint trial of two accomplices, Evans and Bruton. Evans had confessed orally, implicating Bruton, and a postal inspector testified to Evans' confession. Evans did not take the stand. There was no evidence of bad faith on the part of the prosecutor, and the court gave repeated and detailed instructions to the jury that Evans' confession must be disregarded as to Bruton. Yet, this Court reversed the conviction following the principles of *Pointer, Douglas* and *Jackson* v. *Denno*, 378 U.S. 368, 84 Sup. Ct. 1774, 12 L.Ed. 2d 908 (1964).

This Court has now decided that *Bruton* applies retroactively because the denial of the right to cross-examine a confessing accomplice is a "serious flaw in the fact finding process." *Roberts* v. *Russell*, 392 U.S. 293, 294, 88 Sup. Ct. 1921, 1922, 20 L.Ed. 2d 1100, 1102 (1968).

In the present case, the Oregon prosecutor was amply forewarned that Rawls might refuse to testify in Frazier's trial (Tr. 5-6, 579; A. 27-28, 81-82). Nevertheless, he elected to place Rawls' confession—implicating Frazier in exquisite detail—before the jury in his opening statement (Tr. 261-64, A. 41-43). The prosecutor gave the jury no reason to doubt either the existence or the truth of Rawls' confession. When Rawls invoked the Fifth Amendment, Frazier was not only denied his right of confrontation, but the jury may well have inferred both that Rawls had indeed confessed and that his statement was true.

One need not read beyond *Pointer* to realize that the right of confrontation and cross-examination is one of the essential elements of the adversary system:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." 380 U.S. at 405.

With all respect to the Ninth Circuit, there is nothing "wasteful and mischievous" (388 F.2d at 779; R. 41; A. 15) about a rule which seeks to protect this essential right against the most pernicious sort of infringement, the use against one defendant of his alleged accomplice's confession. On the contrary, we submit that the Ninth Circuit has announced the mischievous rule, a rule which, in the case at bar, has permitted a substantial and damaging intrusion

upon petitioner's Sixth Amendment rights. The decision below should be reversed, and the judgment of the district court reinstated.

II.

Frazier's Confession, Given After His Request for Counsel Had Been Ignored and After He Had Been Deceived Into Believing That His Alleged Accomplice Had Incriminated Him, Was Illegally Obtained and Its Admission Into Evidence Violated His Fifth and Sixth Amendment Rights.

The Sixth Amendment principles applicable to this record are those announced in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L.Ed. 2d 977 (1964), since Frazier's trial occurred in the interim between that decision and the decision in *Miranda* v. *Arizona*, 384 U.S. 436, 86 Sup. Ct. 1602, 16 L.Ed. 2d 694 (1966). *Johnson* v. *New Jersey*, 384 U.S. 719, 86 Sup. Ct. 1772, 16 L.Ed. 2d 882 (1966). In addition to the Sixth Amendment issue, the record also presents a general question of voluntariness under the Fifth and Fourteenth Amendments.

After being taken into custody, Frazier was interrogated by the police at some length without being told of his Fifth Amendment right to remain silent, of the fact that anything he said could be used against him, or of his Sixth Amendment right to counsel (Tr. 477-88; A. 50-57). The investigation had focused on Frazier as a prime suspect prior to the time that he was questioned (Tr. 472). At the time of the interrogation, which began about 5:00 p.m., Frazier had not eaten all day, a fact of which the police were aware (Tr. 492; A. 59).

After Frazier had made some damaging statements about his Marine uniform, the detectives advised him, "if you want an attorney, why you can have an attorney;" and "What you say here could be used against you in a trial, you understand that?" (Tr. 488; A. 57). When Frazier indicated an understanding, the detectives continued their questioning, without affording Frazier any opportunity to exercise those rights. (*Ibid.*)

The police quickly assumed a more aggressive tack, confronting Frazier with a series of "facts." Among these "facts" was the deliberate misrepresentation that Jerry Rawls had been apprehended and "has told us the whole story." (Tr. 490; A. 58). In fact, Rawls was not arrested until four hours after Frazier's interrogation (Sp. Tr. 14, 16), and the "facts" related to Frazier were actually obtained from a tip given by a member of Rawls' family and from various other witnesses (Tr. 252-57; A. 35-39; Tr. 474-75).

In response to this police tactic, Frazier made additional admissions concerning his activities during the evening in question, prior to the time of the offense. But before Frazier revealed any details about Marleau's death, the following colloquy took place:

> "A. I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now.
>
> Q. You can't be in any more trouble than you are in now. You have been with him, and you have gone down 82nd with him, and you say he started this whole business . . . ." (Tr. 495-96; A. 61).

Psychiatric evidence introduced at Frazier's trial shows that he was then a passive, "intropunitive" person, prone to take the blame whenever accused of wrongdoing—so passive that he was but "a leaf blowing in the wind," and his daily defense was, "Do with me what you will." (Tr. 853, 854-55; A. 94, 95). His emotional status was "extremely immature" and he was a "conscientious conformist, rather shy and acceptant of discipline and direction." (Tr. 925-26; A. 95). See generally, Driver, "Confessions and the Social Psychology," 82 Harv. L. Rev. 42 (1968).

This record leaves little doubt that the police interrogators were skillfully playing upon Frazier's passivity and manipulating the questioning to pressure Frazier to confess. Only after Frazier had begun to answer questions did the police warn him of his rights. That warning was at best perfunctory and it was immediately followed by a long statement intimating that the police had evidence against Frazier and a suggestion that he confess (Tr. 488-89; A. 57).

When Frazier soon sought to exercise his Sixth Amendment right to counsel by the timid, but plain, request set forth above, the police used the same tactic—an accusing statement followed by aggressive questions—to turn aside the request (Tr. 495-96; A. 61-62).

Frazier thereupon confessed in some detail, although it is noteworthy that his statement varies significantly from that of Rawls. (Compare Tr. 496-510; A. 61-70 with Ex. 5, pp. 7-9, R. 20; A. 97-99, 5). This confession, reduced to writing and signed by Frazier, was admitted into evidence at Frazier's trial, after a finding by the trial judge that the confession was voluntary (Tr. 557-60; A. 76-78).

In admitting Frazier's confession, the Oregon trial judge seemed of the opinion that a defendant's rights under the Fifth and Sixth Amendments are not inviolate unless some element of trickery is also present:

> ". . . In almost every one of the cases which I have read, there has been some fact which would indicate some area of trickery, where there has been some real unfairness on the part of the police, something where they have gone beyond what justice would expect of police officers." (Tr. 558; A. 77).

The Ninth Circuit, on the other hand, appears to hold that Frazier's request for a lawyer was but a passing statement and that, if he had really wanted the assistance of an attorney, he would have pursued the matter. 388 F.2d at 782 (R. 41; A. 20-21). Moreover, the court of appeals held that the police were not bound to honor Frazier's request because he had not previously arranged for the assistance of a lawyer, as had Danny Escobedo. *Ibid.* Compare *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L.Ed 2d 977 (1964).

Even prior to Frazier's trial, the Oregon Supreme Court had recognized that the principles of *Escobedo* do not apply only to wealthy, sophisticated, or experienced defendants. *State* v. *Neely*, 239 Or. 487, 503, 395 P.2d 557, on rehearing, 398 P.2d 482, 486 (1965). Yet, the Ninth Circuit held in the case at bar that the principles of *Escobedo* are not applicable here because (1) Frazier's request for counsel was too timid and (2) Frazier did not request to see *his* counsel. It is unreasonable to assume that *Escobedo* was intended to be limited to aggressive defendants and

defendants with the foresight and funds with which to retain an attorney prior to arrest.

Moreover, the record in this case shows not only a violation of *Escobedo* principles, but also that Frazier's confession was induced by the police by deliberate factual misrepresentations and psychological coercion, making the confession involuntary and inadmissible under well-established Fifth and Fourteenth Amendment principles. The case of *Haynes* v. *Washington*, 373 U.S. 503, 83 Sup. Ct. 1336, 10 L.Ed. 2d 513 (1963), reaffirmed that "the question in each case is whether the defendant's will was overborne at the time he confessed," 373 U.S. at 513. As noted in *Davis* v. *North Carolina*, 384 U.S. 737, 86 Sup. Ct. 1761, 16 L.Ed. 2d 895 (1966), the absence or delay of constitutional warnings is a significant factor in considering the voluntariness of statements later made.

This Court must, of course, independently review the constitutional question whether Frazier's confession was improperly obtained and admitted into evidence. E.g., *Haynes* v. *Washington, supra; Ashcraft* v. *Tennessee*, 322 U.S. 143, 147, 64 Sup. Ct. 921, 88 L.Ed. 1192 (1944). We submit that Martin Frazier's confession was illegally obtained and his conviction was tainted by the admission of that confession. To the state's contention that Frazier waived this constitutional error by taking the stand in his own defense, we note only that his testimony was undoubtedly impelled by the prosecution's misuse of his and Rawls' confessions, and was, therefore, the fruit of the poisonous tree. *Harrison* v. *United States*, 392 U.S. 219, 88 Sup. Ct. 2008, 20 L.Ed. 2d 1047 (1968). The state can hardly insist on a waiver in such circumstances.

The decision below should be reversed, and the judgment of the district court reinstated on the further ground that Frazier was convicted with the use of an illegally obtained confession.

III.

Frazier's Duffel Bag, Which Was Searched Without a Warrant and Without Frazier's Consent, But With the "Consent" of Another Person, Was Illegally Searched and the Contents Were Received in Evidence in Violation of His Fourth Amendment Rights.

When Rawls was arrested outside his home, he disclosed to the police that his clothing was in a blue duffel bag in his room (Sp. Tr. 17, 20; A. 25-26). One of the officers went with Rawls' brother to the bedroom and brought the bag out. Another officer thereupon opened one of the side, zippered compartments of the bag (Sp. Tr. 20; A. 26). After observing the contents, he asked Rawls' mother for permission to take the bag and contents, which she granted (*Ibid.*). The police had no search warrant, at this or any later time (Sp. Tr. 21; A. 26).

The duffel bag was, of course, Frazier's, and its contents were largely his possessions, except for some of Rawls' clothing in the side, zippered pockets (Sp. Tr. 23, 27-28, 38-39).

The prosecution offered into evidence Frazier's bloody clothing which had been removed from the bag, and the trial court denied Frazier's motions to suppress the evidence and for a mistrial, finding that "third parties"—presumably Rawls or his mother—had consented to the taking

of the bag and apparently to the search of the contents of the bag (Tr. 735; A. 89-90).

Assuming that Rawls or his mother consented to the search of the contents of the bag, there is no evidence that either had authority to consent to such a search on behalf of Frazier, and therefore their consent is not binding on Frazier.

This aspect of the case is controlled by the principles announced in *Stoner* v. *California*, 376 U.S. 483, 84 Sup. Ct. 889, 11 L.Ed. 2d 856 (1964). There this Court held unlawful a search of a hotel room consented to by the manager:

> "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, . . . , which only the petitioner could waive by word or deed, either directly or through an agent. . . ." 376 U.S. at 489.

In *Reeves* v. *Warden*, 346 F.2d 915 (4th Cir. 1965), the Fourth Circuit applied *Stoner* to facts similar to the case at bar and held unlawful a search of the accused's dresser to which his mother had consented, even though the mother had access to the dresser and had used it for her own purposes:

> "If one person, even a member of the household, may on one occasion, without the knowledge or consent of the user, secrete a single object in one drawer of a bureau habitually and exclusively used by that person and thereby acquire the power to destroy the right of privacy secured to the user by the Fourth

> Amendment, then 'the right of the people to be secure in their persons, houses, papers, and effects * * *' becomes an illusory guarantee indeed." 346 F.2d at 925-26.

In *People* v. *Miller*, —— Ill. ——, 238 N.E. 2d 407 (1968), cert. denied, 37 U.S.L. Week 3191, No. 523, this Term, on November 25, 1968, the Illinois Supreme Court relied on *Stoner* to invalidate a search of the defendant's automobile, which was parked in the garage of the private home where defendant was employed. The owner of the house had consented to the search, and this consent was offered as justification. The Illinois court said:

> ". . . Regardless of the officer's good faith in making the search and his reliance upon the consent given by the owner of the house, the fact remains that it was Miller's constitutional right which was at stake." 238 N.E. 2d at 409.

In the present case the Ninth Circuit upheld the search of Frazier's duffel bag on the theory that Rawls or his mother had authority to and did in fact consent to the opening and search of the bag, and that the failure to determine their authority to consent or the ownership of the bag was immaterial. 388 F.2d at 783 (R. 41; A. 22). This holding invites careless police practices and unjustified intrusions upon the right of privacy secured by the Fourth Amendment. There is nothing unreasonable about a rule requiring the police to determine the ownership of luggage and obtain a proper warrant or consent, once the luggage is in their possession, prior to searching it. This Court said in *Stoner*:

> "... Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" 376 U.S. at 488.

As an alternative ground for its opinion, the Ninth Circuit held that the admission of the bloody clothing was at most harmless error, in part because Frazier took the stand in his own defense. 388 F.2d at 783 (R. 41; A. 22). This clothing was used by the prosecution in its closing argument in order to prove Frazier a "liar" (Ex. 3, p. 16, R. 20). We submit that the court of appeals' alternative holding is not supported on the record presented. Moreover, such a holding violates the "harmless error" principles of *Fahy* v. *Connecticut,* 375 U.S. 85, 84 Sup. Ct. 229, 11 L.Ed. 2d 171 (1963), *Chapman* v. *California,* 386 U.S. 18, 87 Sup. Ct. 824, 17 L.Ed. 2d 705 (1967), and the principle of *Harrison* v. *United States,* 392 U.S. 219, 88 Sup. Ct. 2008, 20 L.Ed. 2d 1047 (1968), holding that the state must prove beyond a reasonable doubt that Frazier's testimony was not impelled by the prior violations of his rights.

For these reasons, the decision of the Ninth Circuit should be reversed and the judgment of the district court should be reinstated.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed, and the judgment of the district court granting the writ of habeas corpus should be reinstated.

Respectfully submitted,

R. W. Nahstoll
Jonathan A. Ater
Howard M. Feuerstein
Counsel for Petitioner

December, 1968

APPENDIX A

Comparison of Portion of Opening Statement With Portion of Confession of Jerry Lee Rawls

Opening Statement

[illegible] the man in the Olds hit [illegible] first in the nose and [illegible] him back a little ways [illegible] Marty jumped out of the [illegible] and Rusty said something to [illegible] but Rawls didn't hear what [illegible] said.

[illegible] grabbed hold of Rusty and [illegible] walked to him and told [illegible] to let go.

Rusty and Rusty didn't pay any attention to him, so Rawls says that Marty [illegible] picked up a rock off the ground and hit him in the back of the head.

All three struggled and fell over the bank. When they fell down Rawls said he kicked him in the ribs a couple of times and he was standing up then and Marty and Rusty were on the ground and he didn't know how much fighting [illegible] Where but he started to [illegible] back up toward the car. [illegible] said he tripped trying to [illegible] on the bank on some wire [illegible] there is wire, and he fell back down, and he could hear [illegible] grunting but he didn't say [illegible]

Rawls' Confession

[illegible] and then he hit me be[illegible] side my nose on my cheek, and knocked me back a little ways. Marty then jumped out of the [illegible] and Rusty said something to Marty, I don't know what it was.

Rusty then grabbed ahold of Marty. I walked over to them [illegible] to let go of Marty. He didn't pay any attention to me and I picked up a rock off the ground and hit him in the back of the head.

We all three struggled and fell over the bank. When we fell down I kicked him a couple of times in the ribs. I was standing up then and Marty and him were on the ground and I don't know how much fighting was going on at that time.

I tripped trying to run up the bank on some wire and fell back down. I could hear Rusty grunting but he didn't say a word.